DISTRICT OF MAINE

PATRICK LEE,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 91-409-P-H**
	)	
KERLIN PEI, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR RULE 11 SANCTIONS

In this derivative action brought by Patrick Lee on behalf of Leader Simulation, Inc. (``LSI") against Kerlin Pei, H. Michael Swartz and Maine Yankee Atomic Power Co. (``Maine Yankee"), summary judgment was granted for Pei and Swartz on all counts of the complaint and for Maine Yankee on all counts but one, a breach of contract claim. Order (Docket No. 82). Summary judgment was later granted for Lee on the remaining breach of contract claim against Maine Yankee for $3,400 in stipulated damages. Stipulation (Docket No. 87); Order on Defendant Maine Yankee's Motion for Summary Judgment on Count III (Breach of Contract) (Docket No. 86). Final judgment was entered accordingly. Judgment (Docket No. 89). Lee commenced an appeal of the adverse summary judgment determinations on May 25, 1993, *see* Notice of Appeal (Docket No. 88), but eventually dropped it voluntarily, effective August 25, 1993, *see* Order of United States Court of Appeals for the First Circuit (Docket No. 90).

This case having been concluded, the defendants now move for sanctions for the wrongful pursuit of this action in violation of Rule 11 of the Federal Rules of Civil Procedure. A hearing on this matter was held before me on December 15, 1993. Evidence was presented by the parties and their attorneys. The parties waived any privilege or work product objections. Instead of holding

oral argument on the matter after receipt of the evidence, pursuant to a request of attorney Cackett I asked that the parties file post-hearing briefs by January 21, 1994. The defendants filed their briefs in a timely manner. Despite specifically requesting the right to do so, attorney Cackett never submitted a post-hearing brief.

I. FACTUAL AND PROCEDURAL BACKGROUND

This Rule 11 proceeding marks the culmination of a long, litigious relationship between Dr. Patrick Lee and Kerlin Pei, which over time expanded to envelop Maine Yankee and H. Michael Swartz. The two adversaries, Lee and Pei, started out as software engineers and business associates with Singer-Link, the company that in 1986 built and installed a control room simulator at Maine Yankee's Wiscasset, Maine nuclear power plant. The simulator is a training device on which operators respond to various control room conditions simulated by the computer. The simulator requires continuing software maintenance and engineering services.

Following the installation of the Maine Yankee simulator in 1986, Lee and Pei left Singer-Link and started LSI, a Maryland corporation. LSI's business was to provide software and engineering services for control room simulators. LSI obtained the contract to furnish Maine Yankee with simulator software maintenance and engineering services. Pursuant to this contract, which was renewed annually, LSI supplied all simulator services for Maine Yankee from 1986 through November 1989. Pei, the resident LSI engineer for the Maine Yankee contract, was on site at the Wiscasset plant almost continuously from the inception of the contract through its termination.

A. The Maryland Litigation

In May 1989 Lee and Pei became embroiled in a Maryland lawsuit involving a dispute over ownership of LSI. Pei alleged that Lee had reneged on a 1986 oral agreement to issue Pei fifty

percent of LSI's stock and had instead issued that stock to his wife, Poa Lung Che. In October 1989 an equity proceeding was held before the Circuit Court for Montgomery County, Maryland. The court found that Pei was a fifty percent owner of LSI pursuant to the 1986 agreement. In December 1989 a hearing was held on the proposed remedies. On January 4, 1990 the court ordered a recision of Poa Lung Che's shares and the issuance of 6,000 shares to Pei so as to provide equal stock ownership. The court also appointed a receiver for LSI.

After posting bond to defer stock transfer until final resolution of the case, Lee appealed the circuit court's decision to the Court of Special Appeals. The appeals court affirmed on April 26, 1991. *See Lee v. Pei*, No. 421 (Md. Ct. Spec. App., April 26, 1991) (unreported). Lee sought review from the Court of Appeals, Maryland's highest court, but certiorari was denied. Despite the denial of certiorari, and hence the resolution of the Maryland action, Lee still refused to issue Pei his LSI shares. Facing a motion for contempt, Lee issued 6,000 shares to Pei in October 1991. This, however, was not the end of the Maryland matter. The damages phase of the litigation had not yet been concluded. Lee and Pei finally reached an oral agreement on the damages issue on July 23, 1993, one business day before a damages hearing was set to begin. The parties executed a mutual release on August 8, 1993.

B. The Maine Litigation

Meanwhile, back in Maine, Maine Yankee got wind of the LSI intracorporate dispute by July 1989. Up to this point Maine Yankee had been completely satisfied with LSI's contractual services. Defendant Swartz, who was Maine Yankee's supervisor of the simulator group, sought and received assurances from Lee that this dispute would not affect LSI's services to Maine Yankee. On November 14, 1989, however, Pei resigned from LSI, effective November 24, 1989. Pei had been the only LSI software engineer on site since the installation of the simulator and was intimately familiar with its operation. On November 25, 1989, Pei, on behalf of his new company, PrimeTech Simulation, Inc., submitted a proposal for the Maine Yankee simulation contract. At a

meeting held on December 4, 1989, Lee offered to supply a replacement engineer but Maine Yankee declined this offer. Because Pei was so familiar with its system, Maine Yankee decided to reevaluate its simulator service needs. By letter dated December 21, 1989, Maine Yankee terminated the 1986 LSI contract. Maine Yankee then began to accept proposals for a new simulation services contract. In addition to the proposal already submitted by Pei, Maine Yankee received bids from LSI and another consultant. Maine Yankee eventually awarded the 1990 simulation services contract to PrimeTech, Pei's company.

On December 13, 1991, nearly two years after the termination of the LSI contract, and while the damages phase of the Maryland litigation was still pending, Lee, on behalf of LSI, filed suit in this court against Pei, Maine Yankee and Swartz. The complaint asserted the following claims: tortious interference with economic relations (Count I); tortious interference with prospective advantage (Count II); breach of contract (Count III); breach of implied covenant of good faith and fair dealing (Count IV); slander per se (Count V); breach of employee fiduciary duties (Count VI); breach of stockholder fiduciary duties (Count VII).

The gravamen of Lee's complaint is that Pei sought to harm LSI and that Maine Yankee and Swartz cooperated in his efforts. *See* Second Amended Complaint (Docket No. 32) 23-24. Specifically, Lee claimed that Maine Yankee, Swartz and Pei ``knowingly and willfully interfered" with LSI's economic relationships ``by actively encouraging LSI's current clients and customers to discontinue business relationships with LSI" (Count I 36); ``intentionally and improperly interfered" with LSI's prospective contractual relationships ``through their malicious communications of untruthful and scandalous allegations" (Count II 38-39); ``combined and conspired" to breach the implied covenant of good faith and fair dealing in the LSI contract (Count IV 45); and ``maliciously and willfully communicated unfounded rumors and untruths" about LSI (Count V 49). Lee also asserted that Maine Yankee ``knowingly and willfully" breached its contract with LSI (Count III 41), and that Pei willfully breached his fiduciary duties owed to LSI, both as an employee and stockholder, by usurping a corporate opportunity, namely, the Maine

Yankee service contract, and by damaging LSI's goodwill (Counts VI & VII). All counts except for the breach of contract claim requested damages upwards of half a million dollars. For the breach of contract claim against Maine Yankee, Lee demanded compensatory damages totalling $24,916.68.

1. *Maine Yankee and Swartz*

Once discovery was underway, it quickly became apparent that Lee lacked any evidence to support the strong allegations he had made against Maine Yankee and Swartz, other than the breach of contract claim. For example, at his deposition on November 2, 1992, Lee testified that he had no information that Maine Yankee or Swartz interfered with any of LSI's clients, as alleged in Count I of his complaint, other than Maine Yankee itself. Lee Deposition Vol. I pp. 100-05. Lee also testified that he had no information that Maine Yankee or Swartz interfered with any of LSI's prospective contracts, as alleged in Count II of his complaint, other than the prospective Maine Yankee contract. *Id*. at 103-05.

As for the conspiracy to breach the implied covenant of good faith, as alleged in Count IV of his complaint, Lee based this claim on the fact that Pei had a ``very good relationship" with Swartz; that Maine Yankee did not give LSI the opportunity to prove that it could continue to perform the 1986 contract if renewed; that Swartz said he would give LSI a chance to work on future projects but never did; and that Swartz spoke directly to individual engineers about future projects. *Id*. at 107-10. As for slanderous comments made by Maine Yankee or Swartz, as alleged in Count V of his complaint, Lee testified that Maine Yankee and Swartz were ``very negative about LSI" and had sided with Pei in the dispute. *Id*. at 87, 88, 92. Lee stated, however, that the only ``negative" comments by Maine Yankee and Swartz of which he was personally aware involved nothing more than their expression of concern about whether the Maryland dispute would affect LSI's ability to service the existing contract. *Id*. at 62-70, 99. Moreover, his knowledge of Maine Yankee's and Swartz's ``negative" attitude towards LSI consisted of hearsay statements and suspicions that certain things were said and done. *Id*. at 80-99, 112-14. Lee, however, never uncovered through discovery, as he had hoped, any documentary evidence revealing a concerted effort by Pei, Swartz and Maine Yankee to harm LSI. Repeated communications from Maine Yankee and Swartz made clear that they had provided Lee with all requested information and that

there was no hidden story, as Lee apparently had thought. *See, e.g,* Affidavit of Charles A. Harvey, Jr. (Docket No. 54); Letter of Charles A. Harvey, Jr., (attachment to Docket No. 77). Counsel for Maine Yankee also wrote to Lee's counsel to put them on notice that Maine Yankee considered the case meritless and would seek sanctions if it was forced to incur further expenses. Attachment to Maine Yankee's Rule 11 Hearing Exh. 1 (July 24, 1992 letter of Charles A. Harvey, Jr.).

2. *Pei*

Discovery also produced no admissible evidence to support Lee's allegations against Pei. Lee's assertions against Pei were based primarily on hearsay statements. For example, Lee testified that other engineers had told him that ``Pei said a lot of bad things about me to the customer," meaning Maine Yankee. Lee Deposition Vol. I pp. 92, 106. Lee, however, never took the depositions of any of those individuals who purportedly heard Pei slander LSI. As for the interference with economic relationship and prospective advantage claims, as asserted in Counts I and II, Lee testified that Pei had called some other utilities, Taiwan Power Company and General Public Utilities, and made negative statements about the Maryland lawsuit and Lee's personal business. *Id*. at 101-02. Yet, again, no admissible evidence of these statements was ever produced.

3. *Summary Judgment and Beyond*

Following the close of discovery, on April 26, 1993 Judge Hornby granted the defendants' motions for summary judgment on all counts but the breach of contract claim. Order (Docket No. 82). The court cited the lack of any factual support, and in some instances legal support, for all but one of the plaintiff's seven counts. *Id*. The court noted that the only evidence to support any wrongdoing on the part of any of the defendants was inadmissible hearsay statements recounted in Lee's affidavit and depositions. *Id*. at 3-4, 6. Despite abundant time to do so, however, Lee never took the depositions of any of these purported witnesses, nor did he obtain affidavits from them. *Id*. 3-4. The discovery deadline expired on December 7, 1992 and Lee made no motion for an extension. *Id*. Consequently, in the absence of any factual support for his allegations, or any excuse for failing to furnish such support, the court granted summary judgment on all counts except for his breach of contract claim. As for that claim, the court later granted Lee summary judgment, ruling that Maine Yankee had failed to give LSI the required sixty days notice before termination. Order on Defendant Maine Yankee's Motion for Summary Judgment on Count III (Breach of Contract) (Docket No. 86). The parties stipulated that the damages resulting from Maine Yankee's breach totalled $3,400, including prejudgment interest. Stipulation (Docket No. 87).

Despite the complete lack of admissible factual support for his allegations, and the want of any hope of obtaining such evidence given the expiration of the discovery deadline, on May 25, 1993 Lee filed a notice of appeal of the court's adverse summary judgment determinations. Notice of Appeal (Docket No. 88). This appeal was untimely, however, since the final judgment of this court had yet to be entered. Judgment (Docket No. 89). On July 12, 1993 the First Circuit ordered Lee to show cause why it should not dismiss the appeal as premature. On July 26, 1993 Lee filed a memorandum to show cause. On August 13, 1993, the date on which the appellate briefs of Pei, Swartz and Maine Yankee were all due, Lee filed a voluntary dismissal of the appeal. The First Circuit issued an order dismissing the appeal with prejudice on August 25, 1993. Order of United

States Court of Appeals for the First Circuit (Docket No. 90). The defendants' motions for sanctions followed shortly thereafter. Motion of H.M. Swartz and Maine Yankee Atomic Power Company for Sanctions Pursuant to F.R.Civ.P. 11 (Docket No. 91) (filed September 27, 1993); Motion of Kerlin Pei for Sanctions Against Thomas E. Cackett, Esq., Pursuant to F.R.Civ.P. 11 (Docket No. 94) (filed Oct

C. The Rule 11 Hearing

At a hearing on the defendants' motions for sanctions, attorney Cackett, Lee's lead counsel in both the Maine and Maryland litigation, testified about his investigation into the alleged events and actions that gave rise to the complaint in this case. Attorney Cackett, who lives and practices in Maryland, first became involved with LSI and Lee in January 1990. Transcript p. 77. In March 1990, after long hours of discussion with Lee, Cackett became interested in what happened to Pei in Maine and what happened to the Maine Yankee contract. *Id*. Lee informed him that Pei had received the 1990 simulation services contract with Maine Yankee, this being the same contract that LSI had had for the previous four years. *Id*. at 78. Through communications with Maine Yankee, he attempted to determine Pei's status at Maine Yankee, as employee or subcontractor. *Id*. He never requested any documents from Maine Yankee, however. *Id*. at 17. At this time the only potential cause of action against Maine Yankee Cackett was aware of was a breach of contract claim. *Id*. at 78-79.

On July 22, 1991, before the Maine action was filed, Cackett began discussing with Maine Yankee, through Mary Ann Lynch, Maine Yankee's general counsel, his concerns that Maine Yankee had breached the 1986 LSI contract by failing to give proper notice. *Id*. at 79; Maine Yankee's Exh. 5 (May 31, 1991 Cackett letter). Cackett sought damages of $21,666, covering the two month period required by the notice provision of the contract. Transcript p. 79. With interest, this figure totalled $24,916.68. *See* Maine Yankee's Exh. 3 (Cackett notes); Plaintiff's Exh. 1 (Lynch notes). Lynch testified that this figure was acceptable to Maine Yankee. Transcript pp. 5-6.

In addition to the money damages, however, as a precondition to settling this dispute, Cackett insisted that Maine Yankee assist Lee in ``getting" Pei, that is, cooperate in Lee's upcoming Maine litigation against Pei. *Id*. at 6; Plaintiff's Exh. 1 (``$24,916.68 plus coop. in LSI lawsuit in ME against Kerlin."). Lynch rejected this condition, informing Cackett that if Maine Yankee settled the suit it wanted to be finished with this dispute. Transcript p. 6. She also noted that Maine Yankee had recently contracted with Pei to perform its software simulation services. *Id*. No further settlement negotiations took place until after Lee filed the Maine lawsuit. *Id*. at 6-7.

During the time that Cackett was negotiating with Maine Yankee, he was also interviewing a number of individuals who were employees of LSI and were assigned job responsibilities at the Maine Yankee site. *Id*. at 80. He spoke with Han Hsu, K.C. Lea, Kam Chan, David Shee, as well as his client, about their knowledge and observations of the actions of Pei, Swartz and other individuals from Maine Yankee. *Id*. at 80-96. These individuals told Cackett that during the spring and summer of 1989 Pei, in front of Maine Yankee representatives, was accusing Lee of dishonesty, criticizing LSI and saying that LSI would be out of business by the end of the year. *Id*. at 88-89, 91, 93. Cackett was also told that Pei had stated that he would take over the simulation services contract in 1990. *Id*. at 90, 91, 93. As for Maine Yankee personnel, Cackett was told that ``there was a change in attitude" by Swartz towards LSI, *id*. at 89, that Swartz and Pei had a personal relationship, *id*. at 91, and that Swartz did not react to the assertions Pei made against LSI, *id.* Also, when Lee asked Swartz about any problems with Pei, Swartz responded that nothing was wrong. *Id*. at 95-96.

After learning this information, Cackett concluded that Maine Yankee and Pei were ``likely" involved in a conspiracy to harm LSI. *See* Maine Yankee's Exh. 5 (May 31, 1991 letter). He further concluded that ``we would have to file suit versus Maine Yankee to be able to get documentation, etc., regarding the suspicions that we had about the activities that were taking place there." Transcript p. 97. He hoped to show through Maine Yankee documentation that it was wrongfully cooperating with Pei to allow him to take over the simulator service contract. *Id*. at 98.

What Cackett was looking for was ``some memorandum or notation possibly from Mr. Swartz" predating Pei's November 1989 resignation indicating Maine Yankee's consideration of awarding the service contract to Pei. *Id*. 99-100. Although he had no direct information that this was actually the case, Cackett believed that ``in fact there was something being hidden." *Id*. at 100. Cackett filed suit because he wished to conduct discovery to reveal documentation that would ``hopefully either illuminate or dispel the concerns which under[lie] the filing of the lawsuit." *Id*. at 101. He could think of no other way he could gain access to those alleged hidden documents other than though the discovery process. *Id*. at 104.

Unfortunately for Cackett, however, ``[discovery] did not result in any relevant documents that substantiated our case." *Id*. As for the individuals who had first engendered his suspicions, Cackett never attempted to depose any of them, although he knew he had mechanisms available to compel their testimony during the discovery period. *Id*. at 105-06. Cackett thought he could prevail by subpoenaing them to testify at trial, rather than at deposition. *Id*. at 105. He thought that their live testimony at trial would be more valuable to the case. *Id*.

III. RULE 11

Rule 11 requires an attorney to sign every pleading, motion or other paper filed with the court. Fed. R. Civ. P. 11 (1983 amended version).[1] The attorney's signature constitutes a certification that the attorney has read the filing, and

> that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

[1] The parties agree that the 1983 amended version of Rule 11 applies to this proceeding, not the recently adopted 1993 version, which became effective December 1, 1993, because the alleged sanctionable conduct occurred prior to December 1, 1993. *See* Transcript pp. 114-16; *see also Silva v. Witschen*, No. 93-1720, 1994 WL 86217 at *2 (1st Cir. Mar. 24, 1994).

Id. If a submission to the court is signed in violation of the rule, the court shall impose upon the signing attorney or the represented party, or both, an appropriate sanction, which may include reasonable attorney fees. *Id*.

The purpose of Rule 11 is obvious -- to discourage dilatory and abusive litigation tactics and to curtail frivolous claims and defenses. *See* Fed. R. Civ. P. 11 advisory committee's notes (1983 amendments). The rule contains two separate grounds for sanctions: the ``reasonable inquiry'' clause and the ``improper purpose'' clause. *Lancellotti v. Fay*, 909 F.2d 15, 19 (1st Cir. 1990). The reasonable inquiry prong polices groundless or frivolous filings; the improper purpose prong guards against those pleadings that, while perhaps not devoid of all merit, are nevertheless filed for some malign purpose. *Id*. at 18-19. At its core, Rule 11 imposes an affirmative duty on attorneys to investigate their clients' claims before submitting any filings to the court and to reassess those claims throughout the litigation. *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988). While bad faith clearly justifies sanctions, it is not a prerequisite for a Rule 11 violation. *Lancellotti*, 909 F.2d at 19. The standard is instead one of due diligence and objective reasonableness under the circumstances. *Mariani v. Doctors Assoc., Inc.*, 983 F.2d 5, 7 (1st Cir. 1993); *Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1425 (1st Cir. 1992). A good faith but unreasonable belief that a claim is legally and factually supported will therefore not protect an attorney from Rule 11 sanctions. *Cruz v. Savage*, 896 F.2d 626, 633 (1st Cir. 1990). In measuring an attorney's conduct, the court should avoid using the wisdom of hindsight and should evaluate the reasonableness of the conduct at the time the attorney acted. *Id*.

The rule also imposes a continuing obligation on an attorney to ensure that the proceedings do not continue without an adequate factual or legal basis. *Id*.; *Kale*, 861 F.2d at 758. If, for example, an attorney actively pursues a claim after facts indicating that it is groundless have come to light, this continued prosecution amounts to a violation of the rule. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604-06 (1st Cir. 1988). If, on the other hand, an attorney abandons a claim, which when first asserted had a sufficient factual basis, with reasonable promptness after

discovering that the claim lacks factual merit, no Rule 11 violation has occurred. *See Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc.*, 955 F.2d 98-99 (1st Cir. 1992).

Once a Rule 11 violation is found, the court is bound to impose some sanction. *Figueroa-Ruiz v. Alegria*, 905 F.2d 545, 548 (1st Cir. 1990). The court, however, has broad discretion to fashion an appropriate sanction for the violation. *Mariani*, 983 F.2d at 7. In tailoring the sanction to the particular violation, it is important to remember that Rule 11 sanctions generally serve two main purposes: deterrence and compensation. *Navarro-Ayala*, 968 F.2d at 1427. When a sanction is designed to be compensatory, compensation should be awarded for ``the fair value of response costs reasonably incurred" as a result of the sanctionable conduct. *Id.*

IV. DISCUSSION

The defendants assert that the conduct of the plaintiff and attorney Cackett in this suit violated both prongs of Rule 11, that is, the ``reasonable inquiry" clause and the ``improper purpose" clause. *See generally* Defendants' Post-Hearing Briefs (Docket Nos. 106, 107). In their respective Rule 11 motions, Maine Yankee and Swartz seek sanctions against the plaintiff generally, while Pei seeks sanctions solely against attorney Cackett. *Id.* Though Lee, as a represented party, is himself subject to sanctions for filings signed in violation of the rule, *see* Fed. R. Civ. P. 11 (1983 version), I find that the ultimate Rule 11 responsibility in this case lies with attorney Cackett, who was the person responsible for the prosecution of both the Maryland and Maine actions and the principal signatory and advocate of the numerous filings in this case.[2] *See*

[2] I note that the original complaint in this action, filed on December 13, 1991, was not signed by Cackett, though it lists him as being of counsel. Complaint (Docket No. 1). Cackett was not at that time admitted to practice before this court. Within a week, however, he filed a signed affidavit in support of the plaintiff's motion to allow him to appear pro hac vice. Affidavit of Thomas E. Cackett (Docket No. 3). A short time later, on January 2, 1992, an amended complaint signed by Cackett was filed. Plaintiff's First Amended Complaint (Docket No. 4). From that point forward, January 2, 1992 through May 5, 1993, virtually all of the documents filed in pursuit of this case were signed by Cackett. I note that a few nonsubstantive filings were signed by local counsel only. The defendants, however, have not asserted that any of these filings, taken alone, constitute a Rule 11 violation on the part of local counsel.

Taylor v. United States, 151 F.R.D. 389, 397-98 n.14 (D. Kan. 1993) (``Ideally, Rule 11 sanctions should fall upon the individual responsible for the filing of the offending document[s].") (internal quotation marks and citations omitted). Accordingly, I will address this discussion of Rule 11 compliance to attorney Cackett only. I will consider each defendant separately.

A. Pei

Defendant Pei first contends that it is clear that Lee's suit against him was factually unfounded from its inception and designed to create harassment and stress. I disagree. I find that Cackett conducted a reasonable prefiling inquiry indicating a sufficient factual basis to assert an action against Pei, at least at the time when he filed the complaint. Cackett's prefiling inquiry consisted of interviewing various engineers who had allegedly heard Pei denigrate and threaten Lee and LSI in front of Maine Yankee and state that he would take the 1990 simulation services contract. Cackett also knew that Pei allegedly called two utility companies and criticized Lee and LSI. Moreover, Cackett was aware that Pei was eventually awarded the 1990 service contract, submitting his proposal on behalf of his new company, PrimeTech, just one day after resigning from LSI. This fact, combined with what he had been told by the other engineers, arguably provides some evidence to suggest that Pei may have engaged in conduct that breached some fiduciary duty owed to LSI. I find that all of this evidence, though not very strong, is enough to avoid fact-based sanctions, at least with respect to the initiation of the Maine action. *See Kinmont Indus. Inc.*, 955 F.2d at 98; *Muthig*, 838 F.2d at 605-06.

Pei further notes that Cackett's actions in the Maine suit seemingly mirror adverse developments in the Maryland litigation. From this Pei would have the court infer that Lee brought this suit for an improper purpose, that is, to apply pressure upon him to coerce a favorable settlement in the Maryland litigation. Again, I cannot agree. Because Lee's claims against Pei appeared to have an adequate factual basis in their own right, at least when filed, I cannot say that

this action was *initiated* for an improper purpose. *See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). Otherwise, any time parallel litigation is ongoing the plaintiff in the later suit would face Rule 11 accusations of bringing the second suit for coercive purposes regardless of the validity of the plaintiff's claim. While this may be true in some cases, where the second action is not baseless I am reluctant to infer that the action was brought for an improper purpose in the absence of strong evidence of bad faith. *See Chambers v. Nasco, Inc.*, 111 S. Ct. 2123, 2133 n.10 (1991) (relationship between bad faith and improper purpose); *Townsend*, 929 F.2d at 1362 (relationship between frivolousness and improper purpose); *Marrero Rivera v. Department of Justice of Commonwealth of P.R.*, 821 F. Supp. 65, 74 (D.P.R. 1993) (relationship between bad faith and improper purpose).

No such proof has been provided here. The fact that Cackett's actions in the Maine litigation correspond to negative developments in the Maryland litigation, though perhaps circumstantial evidence hinting at an improper purpose, does not by itself establish malign intent on the part of Cackett. In addition, Cackett's prefiling comments to Maine Yankee about cooperating to ``get'' Pei related to the upcoming Maine litigation, not the Maryland litigation. I therefore find insufficient proof to support a determination that Lee's Maine action against Pei was brought for the imprond. Moreover, I note that during the damages phase of the Maryland litigation and before the initiation of the Maine action, Pei himself, through his Maryland counsel, suggested that Cackett go file a separate action against him in Maine, rather than reopening parts of the Maryland case, if he wanted to raise issues surrounding the Maine Yankee contract. *See* Plaintiff's Exh. 2 at 11. This invitation was not accompanied by any warning that such an action would be viewed as groundless. Pei cannot have it both ways, first suggesting the filing of a Maine action and then claiming it is improper once filed.

Finally, Pei asserts that even if Lee's suit was not baseless or improper when filed, Cackett should have known that there was no support for Lee's allegations once discovery was completed. Cackett's continued pursuit of this action, says Pei, violated his Rule 11 obligation to ensure that the

action did not continue without an adequate factual basis. Here I agree with Pei. While Lee's claims against Pei may have had a sufficient factual basis to support the initiation of this action, no admissible evidence to support any of these claims had been developed by the close of discovery on December 7, 1992. *See* Scheduling Order (Docket No. 36). Lee's allegations against Pei were based primarily on the reports of engineers assigned to the Maine Yankee facility. Though he had the legal mechanisms to do so, Cackett never deposed any of the numerous individual engineers who purportedly provided him with the factual information that justified the filing of this action. Nor did he ever move for an extension of the discovery deadline before it expired. Consequently, at the end of discovery no evidence other than inadmissible hearsay existed to support Lee's allegations against Pei.

Nonetheless, from December 7, 1992 through April 2, 1993 Cackett continued to vigorously pursue this action against Pei and continued to submit signed filings that, at that stage of thefactual basis since they lacked any evidentiary support. For example, on January 15, 1993, Cackett filed a statement of material facts, in opposition to Pei's motion for summary judgment, asserting factual issues that had no evidentiary support. *See* Plaintiff's Supplemental Statement of Material Facts in Dispute (Docket No. 66).[3] These unfounded factual allegations were also asserted in Cackett's memorandum in opposition to Pei's motion for summary judgment, filed on January 8, 1993. *See* Plaintiff's Memorandum in Support of Its Opposition to Defendant Kerlin Pei's Motion for Summary Judgment (Docket No. 61). Cackett also submitted a pretrial brief on April 2, 1993 restating all of his original claims against Pei and asserting triable issues with respect to Pei. *See*

[3] For example, in the supplemental statement of material facts Cackett asserted that ``Pei made repeated, negative and adverse comments and communications to Maine Yankee officials and employees while still employed by LSI . . . ." ( 3); ``Pei communicated with on-site LSI co-worker [sic] who indicated that Pei was planning and already confident that he would personally assume LSI's then-current simulation contract." 4; ``Pei communicated to other LSI current customers damaging and negative statements intended to undermine LSI's relationship with these customers." 7; ``Pei continued this tortious activity intending to interfere with LSI's on-going contractual relationships even after his resignation from LSI." 9; ``Pei communicated negative and damaging information regarding LSI to prospective customers of LSI." 10; and ``Pei communicated slanderous statements directed towards LSI and Dr. Lee." 13. Aside from the hearsay statements of Lee, the evidentiary record contained no factual support for any of these charges.

Plaintiff's Pre-Trial Memorandum (Docket No. 80).[4] I find that the submission of these filings violated Cackett's Rule 11 obligation to ensure that the proceedings not continue without an adequate factual basis. *See Cruz*, 896 F.2d at 633; *Muthig*, 838 F.2d at 606.

I note that this is not a situation where Cackett was merely unable to produce sufficient evidence to avoid summary judgment. *See, e.g., Martin v. Brown*, 151 F.R.D. 580, 586 (W.D. Pa. 1993) (``Rule 11 sanctions are inappropriate simply because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment.") (internal quotation marks and citations omitted); *see also Stitt v. Williams*, 919 F.2d 516, 526-29 (9th Cir 1990). Rather, Cackett never even attempted to produce such evidence. Although he claims to have been unable to obtain voluntary affidavits from any of the various engineers in order to oppose Pei' summary judgment motion, *see* Affidavit of Patrick Lee (Docket No. 69), Cackett never sought to compel their deposition testimony during the discovery period. (Lee's affidavit lists as many as six individuals who allegedly had information about his claims. *See id*. at 4-5.)

Whether this failure was due to inexperience, incompetence, inadvertence or conscious design is immaterial. *See Cruz*, 896 F.2d at 631. The crucial point is that Cackett undertook no discernible effort prior to the close of discovery to establish the factual predicate for Lee's charges against Pei. Yet, despite the total lack of evidentiary support for Lee's allegations, and Cackett's obvious knowledge of such a deficiency, following the close of discovery Cackett continued

[4] For example, the final pretrial memorandum contains the following ``Statement of Plaintiff's Claim":

> Plaintiff asserts that the Defendants cooperated in an effort to interfere, obstruct and divert contracts belonging to Leader Simulation, Inc. to a separate entity wholly owned by Defendant, Kerlin Pei. Plaintiff further asserts that in the process of interfering, obstructing and diverting Leader Simulation's contracts and rightful expectations of continuing contractual and economic relationships, the Defendants further endeavored to discredit Leader Simulation, its officers and employees in knowingly disseminating untruthful and vicious allegations regarding the ability of Leader Simulation and its employees to continue to provide quality services under the then-current and prospective nuclear simulation and engineering contracts.

vigorously to pursue Lee's claims against Pei and to assert strong allegations that he knew no longer had an adequate factual basis. It is this conduct, as reflected in his post-discovery filings, that violated the rule.

B. Maine Yankee and Swartz

Defendants Maine Yankee and Swartz contend that, aside from the breach of contract claim, the remaining claims against them are factually frivolous and that, in any event, the entire suit was brought for an improper purpose. I agree. The breach of contract claim to one side, the crux of Lee's other charges against Maine Yankee and Swartz is that they colluded with Pei to harm LSI. There is absolutely no factual basis for this contention. The most that can be said, based on the various hearsay statements from former LSI engineers, is that Maine Yankee and Swartz were concerned about the rift between Lee and Pei and its possible effect on LSI's service. Lee's deposition bore this out. Any reasonable prefiling inquiry, assumedly involving an interview of Lee, the complainant, would have revealed the total lack of support for any claim that Maine Yankee or Swartz was part of concerted effort to harm LSI. *See Ryan v. Clemente*, 901 F.2d 177, 179-180 (1st Cir. 1990). Indeed, Cackett does not seem to dispute this. As Cackett admitted at the Rule 11 hearing, his ``conspiracy" case against Maine Yankee and Swartz was based on nothing more than his suspicions that they had secretly cooperated with Pei and that they had said certain negative things about LSI. This he hoped to prove through discovery but never did.

Cackett's speculation that Maine Yankee and Swartz had conspired to harm LSI, however, fails to satisfy his prefiling duty to verify that Lee's claims were based *in fact*. Rule 11 requires more than speculations, suspicions or hunches to justify the filing of an action. *See, e.g., Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992); *Nault's Auto. Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25, 36 (D.N.H. 1993); *Multi-M Int'l, Inc. v. Paige Medical Supply Co.*, 142 F.R.D. 150, 152 (N.D. Ill. 1992); *Gutierrez v. City of Hialeah*, 729 F. Supp. 1329, 1333 (S.D. Fla. 1990). The rule does not support a ``shoot-first-ask-questions-later" approach to

litigation. If Cackett was suspicious about Maine Yankee's and Swartz's relationship with Pei, he certainly had options available other than filing suit to confirm or disprove them. For example, after bringing suit against Pei, Cackett could have deposed Maine Yankee and Swartz or compelled the production of certain documents that he thought might substantiate his suspicions. *See* Fed. R. Civ. P. 30(b)(6), 45(d)(1). (I note that such documents do not in fact exist. *See* Affidavit of Charles A. Harvey, Jr. (Docket No. 54).)

The fact that Lee prevailed on his breach of contract claim (Count III) does not preclude a finding of a Rule 11 violation for Cackett's pursuit of this action. *See Dodd Ins. Servs., Inc. v. Royal Ins. Co. of America*, 935 F.2d 1152, 1158 (10th Cir. 1991). In his complaint, Lee demanded $24,916.68 for the remaining sixty days of the contract. Second Amended Complaint (Count III). Lee eventually stipulated that the proper amount of damages for the breach, following Judge Hornby's summary judgment decision, was far less, $3,400. Stipulation (Docket No. 87).

Before suit was filed, however, Maine Yankee was willing to pay the original demand, $24,916.68, but Cackett refused to accept this unless Maine Yankee would also help Lee ``get" Pei in the Maine action. Because Maine Yankee was willing to pay for the remaining time on the contract, no legitimate basis remained for Cackett's filing of the breach of contract claim, the one legitimate count, thus leaving only the unsupported conspiracy allegations. Given Cackett's improper precondition to settlement, I can only infer that the real reason for bringing this action against Maine Yankee and Swartz, with all of its baseless allegations of a joint effort to harm LSI, was to exert pressure on Pei through Maine Yankee in Lee's action against Pei. *See Townsend*, 929 F.2d at 1365 (``A district court confronted with solid evidence of a pleading's frivolousness may in circumstances that warrant it infer that it was filed for an improper purpose.").

In short, therefore, I conclude that Cackett's filing of this frivolous, baseless action against Maine Yankee and Swartz violated Rule 11. Allegations that Maine Yankee and Swartz were cooperating to harm LSI are based on nothing but Cackett's own speculation. This violated the ``reasonable inquiry" clause. Moreover, I find that the real reason Cackett brought this action in the

first place was for leverage in the Maine action against Pei. This violated the[5]

VI. CONCLUSION

Rule 11 sanctions, as a formal castigation of professional conduct, are not to be levied lightly. On the record before me, however, I am constrained to conclude that attorney Cackett violated his Rule 11 obligations, first, by filing and improperly pursuing a frivolous action against Maine Yankee and Swartz and, second, by continuing to pursue a factually unsupported action against Pei after the close of discovery. As a sanction I order attorney Cackett to pay the reasonable response costs incurred by the defendants resulting from the sanctionable conduct. *Navarro-Ayala*, 968 F.2d at 1427.

At the Rule 11 hearing Maine Yankee testified that it spent somewhat more than $55,000 in legal fees for its defense and the defense of Swartz, its employee. *See* Transcript p. 8. Cackett has not questioned the reasonableness of these fees, and in the absence of such objection I consider the claimed fees to be reasonable. Accordingly, I award Maine Yankee and Swartz $30,000. This figure represents the difference between their reasonable attorney fees ($55,000+) and the amount Maine Yankee was willing to pay for the breach of contract claim ($24,916.68). I find that this figure fairly compensates Maine Yankee and Swartz for their reasonable response costs for defending against this baseless action.

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[5] Defendant Swartz also contends that the plaintiff's action against him individually violated Rule 11. Swartz argues that Maine Yankee readily admitted that he was acting as its employee and agent at all times relevant to this suit, *see* Maine Yankee's Exh. 1 at 5, and thus Cackett had no basis for naming or retaining him as an individual defendant. Assuming for the moment that Lee's claims against Swartz had factual merit, which of course they do not, I find that the mere fact that Cackett refused to release Swartz from this action does not amount to a Rule 11 violation. If Lee's allegations of tortious conduct on the part of Swartz were correct, Swartz would have been individually liable for that conduct. *See* Restatement (Second) of Agency 343 (1958). Although Maine Yankee would likely be jointly and severally liable for Swartz's torts, *see, e.g., id.* 248, Rule 11 did not require Cackett to release an individual tortfeasor who retained personal liability, *id.* 217 B, 359, even though his principal agreed to assume responsibility for his actions. Had the plaintiff been able to prevail on his claims against Swartz, Cackett could have looked to both Maine Yankee and Swartz to satisfy the judgment.

As for Pei, he claims to have spent between $28,000 and $30,000 in legal fees in defending against the Maine action. *See* Transcript p. 40. Again, Cackett never questioned the reasonableness of this amount, nor did he question any of the listed expenses in Pei's itemization of attorney fees. *See* Pei's Exh. 1. Based on his itemized attorney fees, *id*., which I have reviewed carefully, I award Pei $7,500. I find that this figure fairly compensates Pei for his reasonable response costs for defending against this factually unsupported action following the close of discovery.

I note that these awards do not include attorney fees spent defending against Lee's aborted appeal, since this court lacks jurisdiction to award such sanctions under Rule 11. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405-09 (1990).

Dated at Portland, Maine this 8th day of April, 1994.

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David M. Cohen
United States Magistrate Judge